Supreme Court, U. S.
FILED
AUG 6 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-195

ANN WHEELER ET AL.,
PETITIONERS,

v.

THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON, INC.; THE ROMAN CATHOLIC ARCHBISHOP OF BOSTON; AND THE PLANNING OFFICE FOR URBAN AFFAIRS, INC.,
RESPONDENTS.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
Supreme Court of the United States.

October Term, 1979.

No. .

ANN WHEELER et al.,
Petitioners,

v.

THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON, INC.; THE ROMAN CATHOLIC ARCHBISHOP OF BOSTON; and THE PLANNING OFFICE FOR URBAN AFFAIRS, INC.,
Respondents.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

The petitioners, Ann Wheeler et al.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts entered in this proceeding on May 10, 1979.

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[1]The other petitioners seeking review of the judgment entered below are Paul Quinn, Madeline E. Steverman, Thomas Patterson, Francis W. Murphy, Catherine E. Levangie, Dorothy Stone and Dorothy Quinn.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts, not yet reported, appears in the appendix hereto (App. 1a-7a). No opinion was rendered by the Superior Court Department of Plymouth County.

Jurisdiction.

The judgment of the Supreme Judicial Court of Massachusetts was entered on May 10, 1979, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether in a dispute confined to the use and ownership of church property a state court is constitutionally required to defer to the ruling of an ecclesiastical tribunal concerning the use and ownership of such property?

Constitutional Provisions Involved.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ..

United States Constitution, Amendment XIV, § 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ..

Statement of the Case.

This is a dispute between the petitioners, who are parishioners of St. Mary's of the Nativity, a Roman Catholic church in Scituate, Massachusetts (hereinafter "the parishioners"), and the respondent Roman Catholic Archbishop of Boston (hereinafter "the Archbishop")[2] concerning the use of certain land in Scituate conveyed to and owned by the Archbishop.

The termination of this litigation in state court via summary judgment necessarily rested upon a basis of undisputed facts. St. Mary's parish was established in 1921 as an unincorporated subdivision of the Archdiocese of Boston. The Archdiocese is a purely ecclesiastical entity of the Roman Catholic Church, having no separate legal existence, and exists to minister to the members of the Catholic faith within its geographical jurisdiction. All real estate within St. Mary's parish, including, until August 4, 1977, the vacant land which is the subject matter of this dispute, is owned by the Archbishop as a corporation sole. Archdiocesan property is held subject to the Massachusetts Acts of 1897, chapter 506.[3]

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[2] When appropriate, the term "Archbishop" will be used in this petition to refer collectively to the three named respondents in this proceeding.

[3] This enactment established the Roman Catholic Archbishop of Boston and his successors in office as a body politic and corporation sole, under the name of the Roman Catholic Archbishop of Boston. Since that time, all Archdiocesan property, real and personal, has been held in the name of the Roman Catholic Archbishop of Boston, a corporation sole.

The Archdiocese of Boston is part of the Roman Catholic Church, an episcopal church which is hierarchical in nature. It shares an identical faith and doctrine with other Catholic churches throughout the world and all these churches look to the Pope in Rome as their ultimate earthly authority. The Archbishop administers the Archdiocese both directly and through a number of boards and tribunals which are quasi-legislative or quasi-judicial in character. The Archbishop is in turn subject to higher ecclesiastical authorities in the church which include quasi-legislative and quasi-judicial bodies. Under canon law, members of the Roman Catholic Church, both lay and clerical, who are aggrieved by any action of their Ordinary (the Archbishop) should seek redress through the Archdiocesan judicial system, particularly the ecclesiastical court of the Archdiocese, the Metropolitan Tribunal.

During the 1930's and 1940's, the named parishioners in the instant case together with other parishioners contributed extra and substantial sums of money to St. Mary's with the intent of purchasing the land presently in dispute. The parcel was a vacant area of land on the corner of Stockbridge Road and Meeting House Lane in Scituate. The purpose of this acquisition, as stated by the priests of St. Mary's and as understood by the parishioners, was to establish a cemetery for the parishioners.

On May 24, 1939, the subject property was purchased by the Archbishop for approximately $2,000. This sum was composed entirely of contributions by the parishioners. The land was vacant at that time and remains so today except that on October 2, 1939, and again in the 1950's, parishioners were buried in this St. Mary's Cemetery (App. 3a).[4]

[4]At a 1939 Scituate town meeting, the board of health had been authorized "to grant a permit for the extension of St. Mary's cemetery to include land on Meeting House Lane and Stockbridge road [*sic*] . . .." (App. 3a.)

In August of 1972, the Archbishop decided to undertake an Archdiocesan housing program to consist of the construction of low and moderate income multi-family housing units. To accomplish this purpose, the Archbishop conveyed the subject land to the Planning Office for Urban Affairs, Inc., a charitable corporation organized by the Archbishop to undertake this type of activity.

Alleging that the land was impressed with either a valid parol trust or an enforceable resulting trust in their favor for use as a cemetery, the parishioners then brought this civil action in Plymouth Superior Court seeking, *inter alia*, declaratory and injunctive relief together with a reconveyance of the property to them. The Archbishop filed a motion to dismiss the complaint under Mass. R. Civ. P. 12(b), supported by an unrebutted affidavit of the Most Reverend Thomas V. Daily, D.D., an auxiliary bishop, chancellor and vicar general of the Archdiocese of Boston.[5] One of the express grounds relied on by the Archbishop to support dismissal was his assertion that the dispute was a purely ecclesiastical matter governed by the canon law of the Roman Catholic Church and that civil courts could not, consistent with the First Amendment to the United States Constitution, assert jurisdiction over the dispute. After hearing the arguments of counsel, the Superior Court judge dismissed the parishioners' complaint without stating any reasons therefor and without a written opinion.

The Supreme Judicial Court of Massachusetts, in an opinion entered May 10, 1979, affirmed the trial court's dismissal of the complaint. Characterizing the Archbishop's motion to dismiss as one for summary judgment under Mass. R. Civ.

[5]This affidavit detailed the hierarchical nature of the Roman Catholic Church, the availability of ecclesiastical remedies to resolve lay or clerical disputes and the fact that none of the parishioners of St. Mary's has resorted to these ecclesiastical remedies in an effort to establish the right to use the subject land as a cemetery.

P. 56 since an affidavit was considered by the trial judge, the court twice stated that "[t]he Constitution of the United States requires dismissal of the complaint" (App. 2a, 4a).[6] It observed that Daily's unrebutted affidavit established that the Roman Catholic Church is a hierarchical church with a tribunal available for the resolution of all church property disputes. Since the parishioners were asserting their claim to the land as members of that church, the court reasoned that the First Amendment required it to refrain from involving itself in such an ecclesiastical controversy. In doing so, the Supreme Judicial Court expressly relied upon *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), reh. denied, 429 U.S. 873 (1976) (hereinafter "*Serbian*"), and *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (hereinafter "*Presbyterian*"). Citing *Serbian*, *supra*, 426 U.S. at 725, the court's opinion concluded: "In the circumstances of this case, the Constitution requires that the civil courts accept the decision of the ecclesiastical tribunal as binding on them" (App. 7a).[7]

The court thereupon affirmed the judgment of dismissal entered below and this petition for writ of certiorari followed.

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[6]The issue of the constitutional propriety of a civil court's assertion of jurisdiction over a dispute involving church property was extensively briefed and argued by the parties on appeal.

[7]Although the court then adverted briefly to the notion that, apart from constitutional considerations, "sound policy dictates that the denominations, and not the courts, interpret their own body of church polity" (App. 6a), it is clear from both the express terms and plain tenor of the court's extended constitutional analysis that it explicitly based its decision upon a determination of the First Amendment question (App. 2a, 4a, 7a). See, e.g., *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 375-376 (1968).

Reasons for Granting the Writ.

1. The Decision Below Conflicts with the Decisions of this Court Determining the Jurisdiction of Civil Courts, Consistent with the First and Fourteenth Amendments, to Resolve Disputes Involving the Use and Ownership of Church Property.

In concluding that it had no jurisdiction to entertain this controversy over the use of the subject land as a cemetery, the Massachusetts Supreme Judicial Court analyzed the recent relevant opinions of this Court together with some of its own precedents which addressed the power of civil courts, consistent with the First and Fourteenth Amendments, to resolve a dispute involving church property. Finding persuasive certain language contained in this Court's opinions in *Serbian*, *supra*, 426 U.S. at 709, and *Presbyterian*, *supra*, 393 U.S. at 449, it ruled that whenever a hierarchical church organization offers a dispute-resolving tribunal with power to determine members' claims concerning the use or ownership of church property, those claims must first be heard by the ecclesiastical tribunal. In addition, the court thought that civil courts must defer to the ecclesiastical judgment as a final and binding one upon the parties (App. 7a). To reach this result, the court overrode language in its earlier decisions which suggested that it should be less reluctant to interfere in ecclesiastical disputes involving property or personal rights in view of the fact that intervening decisions by this Court, particularly *Serbian*, had apparently taken a more restrained position (App. 6a).

The parishioners submit that the Supreme Judicial Court of Massachusetts misread the language and holdings of both the *Serbian* and *Presbyterian* decisions and, in the process, unduly minimized its power as a civil court, consistent with the First and Fourteenth Amendments, to hear the parishioners' claimed

right to use the subject land as a cemetery. Specifically, it rejected the constitutional propriety of applying a "neutral principles of law" approach, a tack consistent with its own prior decisions and one recently reaffirmed by this Court's opinion in *Jones* v. *Wolf*, ____ U.S. ____, 97 S. Ct. ____ (July 2, 1979) (hereinafter "*Jones*"), to resolve this church property dispute.

A. *This Court's Precedents Allow the Supreme Judicial Court to Resolve the Parishioners' Claimed Right to Use the Subject Land as a Cemetery.*

In *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871) (hereinafter "*Watson*"), this Court first enunciated guidelines for civil courts in resolving church property disputes. The Court in *Watson* distinguished (a) property held subject to express provisions of a trust, (b) property held by congregational churches, and (c) property held by churches subject to hierarchical authority. *Id.* at 722-727. It then concluded that civil courts would be bound by the following rules: (a) express trust provisions found to be a part of the instrument of conveyance must be given effect even if it involves the court in an inquiry into religious doctrine;[8] (b) the will of the majority controls congregational church property; and (c) the decision of the highest ecclesiastical judicatory would be binding on churches in a hierarchical structure. *Id.* at 723, 725, 727. Finding the Presbyterian churches there to be within the third category, the *Watson* court held that "the rule of action which should govern the civil courts . . . is, that, whenever questions

[8]This rule was later narrowed somewhat by Justice Brennan's concurring opinion in *Maryland & Virginia Eldership of the Churches of God* v. *Church of God*, 396 U.S. 367 (1970) (per curiam), discussed *infra* at note 12 and accompanying text.

of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727.

Limits to this new rule were, however, discernible in the *Watson* opinion itself. While the terms of a trust deed to church property may not be implied by the civil courts, the Court explicitly noted that courts could enforce the terms of an express trust[9] involving church property. *Id.* at 722-723.

Subsequent decisions[10] had not eroded this last noted exception to *Watson's* general rule of nonreviewability of ecclesiastical decisions by civil courts.[11] And in *Presbyterian* this Court, while noting that the First Amendment severely circumscribes the role that civil courts may play in resolving such disputes, went on to observe: "It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be ap-

[9]An express trust is one "created or declared in express terms, and *usually* in writing. . . ." Black's Law Dictionary, 1681 (4th ed. rev. 1968) (emphasis supplied). The parishioners' claims in the instant case are based in part on an express parol trust in their favor to use the subject land as a cemetery.

[10]*Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131 (1872). *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929). *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190 (1960).

[11]In fact, in *Kedroff* v. *St. Nicholas Cathedral*, *supra*, 344 U.S. at 122, Justice Frankfurter's concurrence reaffirmed *Watson's* recognition that civil courts had a viable role to play in resolving church property disputes when the issue raised can be isolated as a purely secular one.

plied without 'establishing' churches to which property is awarded." 393 U.S. at 449.[12]

One year later, in *Maryland & Virginia Eldership of the Churches of God* v. *Church of God*, 396 U.S. 367 (1970) (per curiam) (hereinafter "*Sharpsburg*"), Justice Brennan, in a concurring opinion, elaborated further upon the propriety of judicial deference to ecclesiastical tribunals in the disposition of religious disputes implicating church property. In the face of such a dispute, a civil court has three options: (1) it may enforce property decisions made by the highest authority in hierarchical churches unless the property is held subject to the express terms of a trust or deed;[13] (2) "neutral principles of law," developed for use in all property disputes, may be applied to resolve the controversy;[14] and (3) resort may be had to carefully drawn statutes which guarantee noninterference with religious tenets. 396 U.S. at 369-370.

This Court's subsequent decision in *Serbian* did not extinguish these various options available to state courts faced with disputes over church property. *Serbian* ruled only that the Illinois Supreme Court had incorrectly applied the principles inhering in the first two options to settle the dispute before it. Besides completely abrogating the "arbitrariness"

[12]Moreover, Justice Harlan's concurrence in *Presbyterian* recognized the continuing viability, consonant with *Watson's* language, of a civil court's jurisdiction to enforce the terms of an express trust in church property. 393 U.S. at 452.

[13]This exception correctly reflected *Watson's* language. But Justice Brennan's concurrence would allow such enforcement of an express trust only where the terms could be enforced without consideration of church doctrine. 396 U.S. at 369 n.2.

[14]This alternative would allow civil courts, among other things, to apply the "formal title" doctrine and other rules of property law to the extent that such application does not require civil courts to resolve doctrinal issues. 396 U.S. at 369-370.

exception of *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929), the *Serbian* Court also concluded that the state court had incorrectly applied its "neutral principles of law" to resolve not a property dispute but an ecclesiastical conflict. 426 U.S. at 708-709, 712-713, 720-721.

That the three options delineated in *Sharpsburg* remain viable methods for state courts after *Serbian* to resolve conflicts concerning isolated property questions devoid of church doctrine or polity has been reaffirmed by this Court's opinion last term in *Jones*. There the Court held that a state court is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute. ____ U.S. at ____, 97 S. Ct. at ____. Moreover, in a footnote, the majority opinion cited *Watson* approvingly for the proposition that, regardless of the form of church government, "it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will or other instrument of church property ownership." ____ U.S. at ____ n.3; 97 S. Ct. at ____ n.3.

Thus it is clear after *Watson*, *Presbyterian*, *Sharpsburg*, *Serbian* and *Jones* that state courts may still, consistent with the First and Fourteenth Amendments, resolve church property disputes by enforcing the terms of an express trust (under *Watson*) or by applying "neutral principles of law" (within the meaning of *Presbyterian*, *Sharpsburg*, *Serbian* and *Jones*) as long as either method does not implicate a resolution of church doctrine or polity.

By reading this Court's decisions in *Serbian* and *Presbyterian* as precluding state court review in *all* cases involving hierarchical church property as long as an ecclesiastical tribunal is available to rule on the question, the Massachusetts Supreme Judicial Court misinterpreted the holdings of those cases and too narrowly conceived its jurisdiction to rule on the parishioners' claimed right to use the subject land as a cemetery. This claimed misreading and misconception by the state court here is only reaffirmed by this Court's recent decision in *Jones*.

B. *The Massachusetts Supreme Judicial Court has Previously Enforced Express Trusts Involving Church Property and Applied Neutral Principles of Law to Resolve such Disputes.*

Had the Supreme Judicial Court correctly interpreted this Court's precedents and properly conceived its own jurisdiction to rule on the parishioners' claims via express trust principles or other neutral principles of property law, it would have found ample precedential guidance from its own prior decisions dealing specifically with church property.

Express trust principles were applied to a deed of property to the Christian Science Board of Directors in *Dittemore* v. *Dickey*, 249 Mass. 95, 104-107 (1924). See also *Eustace* v. *Dickey*, 240 Mass. 55, 67, 72-73 (1921) (same). In *Attorney General* v. *Armstrong*, 231 Mass. 196, 203-205 (1918), the Commonwealth's highest court interpreted a deed of land to certain trustees for the use of the Methodist Episcopal Church; and it proceeded to determine the trust's beneficiaries. See also *Canadian Religious Ass'n* v. *Parmenter*, 180 Mass. 415 (1902) (majority of church members could not close the church against wishes of a minority where there was a trust of church property for the benefit of all members). Similarly, in *Gay* v. *Baker*, 17 Mass. 434, 438 (1821), the state court applied "just and equitable" trust principles to establish a parishioner's property right to a pew space in the Congregational meetinghouse. And in *Baker* v. *Fales*, 16 Mass. 487, 494-495 (1820), the court again applied traditional trust principles to determine the property rights of respective factions of a Congregational church.

In the same sense, the Supreme Judicial Court has been "less reluctant" to interfere in church disputes and apply neutral principles of law when the "central issue" involves civil or property rights or the construction of a legal document. See,

e.g., *Mitchell* v. *Albanian Orthodox Diocese in America, Inc.*, 355 Mass. 278, 282-283 (1969) (church by-law interpretation); *Kubilius* v. *Hawes Unitarian Cong. Church*, 322 Mass. 638, 644 (1948) (same); *Gray* v. *Christian Society*, 137 Mass. 329, 330-331 (1884) (deprivation of membership in a church without a hearing and without a vote of the society held invalid); *Proprietors of St. Luke's Church in Chelsea* v. *Slack*, 61 Mass. (7 Cush.) Mass. 226, 238-239 (1851) (rights and duties of members of religious society determined). See also *Gorodetzer* v. *Kraft*, 360 Mass. 743, 745 (1972) (defamation). Thus, like the Georgia Supreme Court in *Jones*, the Massachusetts Supreme Judicial Court has a history of resolving church property disputes by resort to either express trust principles or other neutral principles of property law in appropriate circumstances.

Like the property dispute considered in *Wiethoff* v. *St. Veronica School*, 210 N.W. 2d 108, 110 (Mich. App. 1973), and *Klix* v. *Polish Roman Catholic St. Stanislaus Parish*, 118 S.W. 1173 (Mo. App. 1909), this controversy is one confined to the use of church property. It is not a dispute evoking a determination of which of two factions within a church has deviated from doctrinal precepts and, therefore, is entitled to church property. The issue is simply whether the land bought by the Archbishop with the parishioners' extra contributions was impressed with an enforceable parol trust or a resulting trust in favor of the parishioners for use as a cemetery. Yet the Supreme Judicial Court's misreading of relevant decisions of this Court caused it to misconceive its power to resolve this question and to defer unnecessarily to the judgment of ecclesiastical authorities.

This conflict therefore justifies the grant of certiorari to review the judgment and opinion below.

2. THE DECISION BELOW RAISES AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE POWER OF CIVIL COURTS IN MASSACHUSETTS TO RESOLVE CHURCH PROPERTY DISPUTES.

This Court's continuing, conscientious and detailed attention to the issue of defining a civil court's jurisdiction, consistent with constitutional principles, to resolve church property disputes, as exemplified by *Watson*, *Presbyterian*, *Sharpsburg*, *Serbian* and *Jones*, is persuasive evidence of the critical importance of the constitutional issues raised by the state court's inaction here. The parishioners are entitled to have their property rights as citizens (*not* as members of the Roman Catholic Church) determined by the civil courts rather than an ecclesiastical tribunal. The judgment below will continue the confusion surrounding the state of the law in Massachusetts concerning such disputes after *Serbian* and *Jones* and will reinforce the erroneous conclusion that state courts have no role to play in determining the property rights of members of any hierarchical religious organization. But the decisions of this Court clearly indicate that the First and Fourteenth Amendments do allow an active role for civil courts in appropriate circumstances.

This uncertain and erroneous view of the law in Massachusetts thus raises serious and important constitutional issues justifying the issuance of a writ of certiorari to review the judgment and opinion of the Massachusetts Supreme Judicial Court.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

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July 29, 1979.

Appendix.

SUPREME JUDICIAL COURT

ANN WHEELER & OTHERS *vs.* ROMAN CATHOLIC ARCHDIOCESE OF BOSTON & OTHERS.

Plymouth. April 5, 1979. — May 10, 1979.

Present: Hennessey, C.J., Quirico, Kaplan, Liacos, & Abrams, JJ.

Religion. Jurisdiction, Ecclesiastical controversy. *Constitutional Law*, Freedom of religion.

CIVIL ACTION commenced in the Superior Court on March 21, 1978.

A motion to dismiss was heard by *Hayes*, J., a District Court judge sitting under statutory authority.

After review was sought in the Appeals Court, the Supreme Judicial Court ordered direct appellate review.

William J. Clary for the plaintiffs.

James G. Dolan, Jr., for the defendants.

HENNESSEY, C.J. The complaint in this case was brought by parishioners of St. Mary's of the Nativity, a Roman Catholic church in Scituate, seeking to impose a trust on certain land conveyed to the Roman Catholic Archbishop of Boston. The defendants filed a motion to dismiss the complaint under Mass. R. Civ. P. 12 (b), 365 Mass. 754 (1974). They also filed an affidavit of the Most Reverend Thomas V. Daily, D.D., who is an auxiliary bishop, chancellor, and vicar general of the Archdiocese of Boston. No counter-affidavits were filed by the plaintiffs. A District Court judge, sitting by statutory authority in the Superior Court, dismissed the complaint after hearing. The plaintiffs appealed.

No reasons were given in the judge's order of dismissal, and the parties on appeal have treated the dismissal as granted

under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), for failure of the complaint to state a claim on which relief can be granted. Since there was an affidavit on file as well as the complaint, it seems clear to us that the judge treated the motion to dismiss as a motion for summary judgment. It is appropriate for us to consider the case in that light, and we do so. Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974).

There was no error. The Constitution of the United States requires dismissal of the complaint. We summarize the facts from the complaint, and from Bishop Dailey's uncontroverted affidavit. The plaintiffs are Scituate residents and members of St. Mary's of the Nativity Parish (St. Mary's). St. Mary's was established in 1921 as an unincorporated subdivision of the Archdiocese of Boston. The Archdiocese itself is a purely ecclesiastic entity of the Roman Catholic church, having no separate legal existence, and exists to minister to the members of the Catholic faith within its geographic jurisdiction. All real estate within the parish of St. Mary's, including, until August 4, 1977, the vacant land which is the subject of this controversy, is owned by the Archbishop of Boston, a corporation sole. Archdiocesan property is held subject to St. 1897, c. 506.

The Archdiocese of Boston is part of the Roman Catholic church, an episcopal church which is hierarchical in nature. It shares an identical faith and doctrine with other Catholic churches throughout the world and all these churches look to the Pope in Rome as their ultimate earthly authority. The Roman Catholic Archbishop of Boston administers the Archdiocese both directly and through a number of boards and tribunals which are quasi-legislative or quasi-judicial in character. The Archbishop is in turn subject to higher ecclesiastical authorities in the church. These authorities also include quasi-legislative and quasi-judicial bodies. Under canon law, members of the Roman Catholic church, both lay and clerical, who are aggrieved by any action of their Ordinary (the Archbishop) should seek redress through the Archdiocesan judicial system, particularly the ecclesiastical court of the Archdiocese, the Metropolitan Tribunal. To date, none of the plaintiffs or any other members of St. Mary's parish, have brought any proceeding in the ecclesiastical judicial system.

During the 1930's and 1940's, the plaintiff parishioners and other parishioners contributed extra and substantial sums to St. Mary's with the intent of purchasing the subject locus, a vacant area of land on the corner of Stockbridge Road and Meeting House Lane, Scituate. The purpose of this acquisition, as stated by the priests of St. Mary's and as understood by the parishioners, was to establish a cemetery for the parishioners.

On May 24, 1939, the subject property was purchased by the Archbishop, a corporation sole, for approximately $2,000. This $2,000 was the money contributed by the parishioners. The deed contains no restrictions or other indications as to its proposed use. The land was vacant at that time and remains so today. At the 1939 Scituate town meeting, the board of health was authorized "to grant a permit for the extension of St. Mary's cemetery to include land on Meeting House Lane and Stockbridge road." On October 2, 1939, and again in later years, parishioners were buried in St. Mary's Cemetery.[1]

In August of 1972, the Archbishop of Boston decided to undertake an Archdiocesan housing program to consist of the construction of low and moderate income multi-family housing units. To this end, the Archbishop on August 4, 1977, con-

[1] Although the defendants, for purposes of their motion to dismiss, concede that several parishioners were buried upon the land which is the subject of this action, it is plain from the defendants' brief and argument that their ultimate position would be that these burials took place in the presently existing St. Mary's Cemetery, which is a locus separate from the one here concerned. The single "record of death" attached to the complaint shows burial merely at "St. Mary's" Cemetery.

veyed the subject land to the Planning Office for Urban Affairs, Inc., a corporation organized by the Archbishop under G.L. c. 180 to undertake this type of activity.

The plaintiffs argue that the parcel of land has been impressed with a parol trust, with the beneficial enjoyment of that trust secured in the parishioners of St. Mary's, citing *Bailey* v. *Wood*, 211 Mass. 37, 42 (1912), and *Metropolitan Life Ins. Co.* v. *Pollack*, 332 Mass. 582, 583 (1955). In the alternative, they argue that a resulting trust should be recognized for the beneficial enjoyment of the parishioners, citing *Howe* v. *Howe*, 199 Mass. 598, 600-601 (1908), *Meskell* v. *Meskell*, 355 Mass. 148, 150 (1969), and *Murphy* v. *McKenzie*, 1 Mass. App. Ct. 553, 555 (1973).

As we have stated above, the Constitution of the United States requires dismissal of the complaint. The First Amendment, applicable to the States through the Fourteenth Amendment, permits hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 724, rehearing denied, 429 U.S. 873 (1976). Indeed, State governments, like the Federal government, are required to refrain from involving themselves in ecclesiastical affairs or controversies. *Id.* See *McDaniel* v. *Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring). Thus, in our view, the relevant issues for the court's determination in this proceeding for summary judgment are whether the Roman Catholic church is a hierarchical church, whether that church maintains a tribunal for the resolution of controversies of this nature, and whether the plaintiffs assert their claims as members of that church. All three matters are uncontroverted: a competent church tribunal exists and has been identified; the plaintiffs assert their rights as members of a Roman Catholic parish; and the Roman Catholic church is hierarchical, since its local parishioners are not intended to be self-governing.[2] It follows that the complaint was properly dismissed.[3]

The plaintiffs particularly argue that their case is not "purely ecclesiastical" in nature, but instead involves a property dispute of which the courts should take cognizance. They rely especially on *Gorodetzer* v. *Kraft*, 360 Mass. 743 (1972), and *Mitchell* v. *Albanian Orthodox Diocese in America, Inc.*, 355 Mass. 278 (1969), in both of which this court decided that there were justiciable controversies. The plaintiffs' view is that the courts should take jurisdiction where the case essentially concerns a property interest, trust relation, or personal, contractual, or tortious rights of the parties. See *Moustakis* v. *Hellenic Orthodox Soc'y*, 261 Mass. 462, 465 (1928).

Our view is more restrained. "Even when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on

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[2] There are at least three kinds of internal church structures, or polity, which may be discerned: congregational, presbyterial, and episcopal. "In the congregational form, each local congregation is self-governing. The presbyterial polities are representative, authority being exercised by laymen and ministers organized in an ascending succession of judicatories — presbytery over the session of the local church, synod over presbytery, and general assembly over all. In the episcopal form power reposes in clerical superiors, such as bishops. Roughly, presbyterial and episcopal polities may be considered hierarchical, as opposed to congregational polities, in which the autonomy of the local congregation is the central principle." Note, Judicial Intervention in Disputes over the Use of Church Property, 75 Harv. L. Rev. 1142, 1143-1144 (1962). Accordingly, whether or not a given church is hierarchical is a question of fact. See *Kelley* v. *Riverside Boulevard Independent Church of God*, 44 Ill. App. 3d 673 (1976); *State ex rel. Morrow* v. *Hill*, 51 Ohio St. 2d 74 (1977).

[3] We express no opinion whether, if the hierarchical church had no ecclesiastical tribunal, it would then be appropriate for the civil courts to take jurisdiction.

behalf of groups espousing particular doctrinal beliefs." *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra* at 709. Thus, "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S 440, 449 (1969). In the circumstances of the instant case, that language is persuasive. The *Gorodetzer* case, *supra*, relied on by the plaintiffs, concerned a claim by a kosher caterer against a member and officer of a religious congregation, for an alleged libel which occurred after the plaintiff had resigned from the congregation. Thus it did not involve a dispute between members or factions of a church. In the *Mitchell* case, *supra*, also relied on by the plaintiffs, it is far from clear that a hierarchical church was concerned.[4] Further, our words in these and other cases (cf. *Moustakis* v. *Hellenic Orthodox Soc'y*, *supra* at 467) suggesting generally that the courts should be less reluctant to intervene in cases involving property rights or personal rights were written before the teachings of more recent relevant Supreme Court opinions, particularly *Serbian Eastern Orthodox Diocese*, were available.

We have also said that, even apart from any constitutional considerations, we believe that sound policy dictates that the denominations, and not the courts, interpret their own body of church polity. *Gorodetzer* v. *Kraft*, *supra* at 745.[5]

[4] Kirk, J., dissenting from this court's decision in *Mitchell* that the courts should take jurisdiction in the case, stated: "I think the court should stay away from it." *Id.* at 284.

[5] The approach in some cases has not been by constitutional reasoning. In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 732 note, rehearing denied, 429 U.S. 873 (1976), Mr. Justice Rehnquist, dissenting (joined by Mr. Justice Stevens), suggested that the constitutional issues had not been reached in some church cases, since they were "applications of the general principle that persons who have contractually bound themselves to adhere to the decisions of the ruling hierarchy in a private association may not obtain relief from those decisions in a civil court." See, e.g., *Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871).

The plaintiffs, if they are to be heard on the merits of this controversy, must have recourse to the ecclesiastical system. The ultimate result of any such proceeding will not be reviewable in the civil courts. In the circumstances of this case, the Constitution requires that the civil courts accept the decision of the ecclesiastical tribunal as binding on them. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra*, at 725.

Judgment affirmed.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, May 10, 1979.

IN THE CASE No. SJC-1749

ANN WHEELER & OTHERS

vs.

ROMAN CATHOLIC ARCHDIOCESE
OF BOSTON & OTHERS

pending in the Superior Court for the County of Plymouth No. 78-6761

ORDERED, that the following entry be made in the docket; viz., —

Judgment affirmed.

BY THE COURT,

/s/WILLIAM M. CLORAN,

CLERK.

May 10, 1979.

Supreme Court, U. S.
FILED
SEP 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-195

ANN WHEELER, et al., *Petitioners,*

v.

THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON, INC.; THE ROMAN CATHOLIC ARCHBISHOP OF BOSTON; and THE PLANNING OFFICE FOR URBAN AFFAIRS, INC., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

QUESTION PRESENTED

Did the Massachusetts Supreme Judicial Court properly affirm a lower court disposition by summary judgment of a dispute between the Catholic Archbishop of Boston and certain laity in his diocese over his decision to utilize church land for the construction of housing for lower income families?

STATEMENT OF THE CASE

Petitioners, parishioners of St. Mary of the Nativity parish in Scituate, Massachusetts, (Parishioners)[1] seek review by writ of certiorari to the Massachusetts Supreme Judicial Court with respect to its decision affirming dismissal by the State Superior Court of their request for an order voiding the transfer of a parcel of Archdiocesan land by the Roman Catholic Archbishop of Boston (Archbishop) to facilitate construction of low and moderate income cooperative housing.

This controversy is the most recent episode in a seven-year effort by the Archbishop to construct 40 units of low and moderate income housing on vacant church land owned by him. This is the second time that a petition for a writ of certiorari involving this effort has been presented to this Court. 439 US 1078 (1978) The facts underlying this sequence of administrative and judicial decisions are summarized below.

St. Mary of the Nativity parish was established in 1921 as an unincorporated subdivision of the Archdiocese of Boston by the then Ordinary[2] of the Archdiocese. The Archdiocese itself is a purely ecclesiastical entity of the Roman Catholic Church and exists to minister to the members of the Roman Catholic faith within its geographic jurisdiction, which is generally limited to the counties of Essex, Plymouth, Middlesex,

[1] The only evidence in the Record that the plaintiffs are parishioners is an unsupported allegation in the Amended Complaint. The respondents neither concede nor deny the plaintiffs' status as parishioners.

[2] In Roman Catholic terminology, the holder of an ecclesiastical office having territorial jurisdiction. The Archbishop is the Ordinary of Boston.

Suffolk, and Norfolk, in Massachusetts. All real and personal property of the Archdiocese, including all real estate within St. Mary of the Nativity parish, church, rectory, and hall, as well as other land utilized as a cemetery, and until August 4, 1977, the vacant land which is the subject of this controversy, is or was owned by the Roman Catholic Archbishop of Boston, a corporation sole. Archdiocesan land is thus held by virtue of Mass. St. 1897 c. 506, entitled "An Act to Incorporate The Roman Catholic Archbishop and His Successors a Corporation Sole, To Hold and Manage Certain Property For Religious and Charitable Purposes".

On May 24, 1939, the property was purchased from Rockland Trust Company by the Archbishop for the sum of $2,000. The deed contains no restrictions or other indications as to its proposed use. The land was vacant at that time and remains so today. It has never been established as a cemetery by the Town of Scituate. Mass. Gen Laws Ann. c. 114 s. 34 (West 1971) prescribes that cemeteries may be established only by written approval of the Board of Health after notice and hearing in the community and inclusion in the records of the Board of Health of a description of the land sufficient for its identification. Although the 1939 Scituate Town Meeting authorized the Board of Health to grant a cemetery permit, no application for such a permit was ever sought or granted.[3]

[3] On June 20, 1973, some of the plaintiffs and other citizens filed an article seeking to have the town acquire the property by eminent domain for cemetery expansion. At a public hearing, the town's Interment Committee reported the 3,022 available graves existed in Scituate and expressed opposition to the article. The eminent domain article failed of passage at a special town meeting on July 23, 1973.

In 1972, the Archbishop decided to undertake an Archdiocesan Housing Program which would consist of the construction of low and moderate income housing units on parcels of Archdiocesan land in a number of suburban communities with the provision that title to the housing would, upon occupancy, be transferred to the resident in the form of cooperative ownership.

The Archbishop directed that the Archdiocesan Housing Program be planned and executed by the Planning Office for Urban Affairs, Inc., (the Planning Office) a charitable corporation organized by the Archbishop under the provision of Mass. Gen. Laws Ann. c. 180 (West 1958), and established to undertake, *inter alia,* this type of activity. Although a separate legal entity, the Planning Office is an agency of the Archdiocese and listed as such in the Official Catholic Directory. The Archbishop is President and Treasurer and appoints all members of the corporation.

Acting upon the recommendation of professional consultants that the vacant five-acre site in Scituate was suitable for the type of housing contemplated, the Planning Office submitted a preliminary application to the Massachusetts Housing Finance Agency (the MHFA) which approved the site on September 29, 1972.

As a courtesy, the Archbishop directed the Planning Office to explain the Archdiocesan Housing Program and the Scituate proposal to St. Mary's parish council which endorsed the development of the site with housing.

On May 1, 1973, the Planning Office sought authorization from the Scituate Zoning Board of Appeals (Scituate) to develop forty townhouse type dwellings

to be made available to low and moderate income families. The application for a comprehensive permit was submitted in accordance with Mass. Gen. Laws Ann. c. 40B ss. 20-23 (West 1979) and stated that the Planning Office was an agency of the Archdiocese of Boston and was acting at the request of the Archbishop, "who will convey the property to the Applicant prior to the closing of the mortgage loan." The Planning Office had previously obtained a firm commitment from the MHFA to provide financing for the project pursuant to Mass. St. 1966, c. 708 (unofficially codified at Mass. Gen. Law Ann. c. 23A App., ss 1-1 et seq. (West 1973), which authorizes the agency to make first mortgage loans to sponsors of multi-family dwellings. After conducting an administrative hearing, Scituate denied the application on June 29, 1973.

In accordance with Mass Gen. Laws Ann. c. 40B, s. 23, the Planning Office appealed that decision to the Housing Appeals Committee (the Committee) which is authorized to hear appeals by developers when an application for a comprehensive permit is denied by a local board. The Committee concluded, after an extensive adjudicatory hearing, that Scituate's denial of the application was unreasonable and not consistent with local needs, in contravention of the standards set forth in Mass. Gen. Laws Ann. c. 40B, s. 20. Accordingly, the Committee directed Scituate to issue the comprehensive permit, as provided by Mass. Gen. Laws Ann. c. 40B, s. 23.

Scituate petitioned the Massachusetts Superior Court for review of the Committee's decision. The Superior Court entered judgment denying the petition and affirming the Committee's decision. The Massachusetts Appeals Court affirmed the judgment of the

Superior Court, and the Massachusetts Supreme Judicial Court denied Scituate's Application for Further Appellate Review. Both the Superior Court and the Appeals Court rejected Scituate's contention that the Committee's decision violated the First Amendment by excessively entangling the Commonwealth in church affairs, and that church related entities were precluded from participating in government subsidized housing programs.

Scituate submitted a petition for a writ of certiorari to this court which denied the petition on February 16, 1978, 434 US 1078, and on April 6, 1978, Scituate finally issued the comprehensive permit.

On March 21, 1978, 39 years after the property's acquisition, the Parishioners brought suit against the Archbishop (and subsequently the Planning Office), seeking, *inter alia,* an accounting by the Archbishop, a judicial determination that a resulting trust be established in their favor, and entry of a judgment ordering conveyance of the property to them.

On May 9, 1978, a Superior Court judge granted the Respondents' motion to dismiss the Parishioners' complaint on the grounds that it involved a purely religious dispute between Roman Catholic laity and their Archbishop over which civil courts lacked jurisdiction by virtue of the First Amendment to the U.S. Constitution.

While pending in the Massachusetts Appeals Court, The Supreme Judicial Court assumed jurisdiction of the appeal *sua sponte* by order on March 13, 1979. On May 10, 1979 the Supreme Court affirmed the dismissal in the court below and confirmed earlier decisions in-

dicating its view that sound policy dictated that denominations rather than civil courts should interpret their own church polity.

REASONS FOR DENYING THE WRIT

It is well settled that ecclesiastical decisions regarding church affairs are beyond the pale of the jurisdiction of civil courts.[4]

The Massachusetts Supreme Judicial Court has in the instant case found that the decision in question was (a) a matter of ecclesiastical discretion within the competence of the approved church officials and (b) beyond the jurisdiction of the Massachusetts civil courts. The decision in question was that of the Archbishop to alienate certain church properties for the benefit of individuals in need of appropriate housing.

The essence of this controversy is whether the Archbishop may utilize church land for the construction of low and moderate-income cooperative housing against the wishes of eight parishioners who oppose construc-

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[4] Watson v. Jones, 80 US 679 (1871); Gonzalez v. Roman Catholic Archbishop of Manila, 280 US 1 (1929); Kreshilk v. St. Nicholas Cathedral, 363 US 190 (1960); Presbyterian Church v. Blue Hull Memorial Presbyterian Church, 393 US 440 (1960); Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 US 696 (1976). Jones v. Wolf, —— U.S. —— (1979). Fitzerald v. Robinson, 112 Mass. 371, 379 (1873). Grosvenor v. United Society of Believers, 118 Mass. 78 (1875). Carter v. Papineau, 222 Mass. 464 (1916). Moustakis v. Hellenic Orthodox Society of Salem and Peabody, 261 Mass. 462, 466 (1928). Cohen v. Silver, 227 Mass. 230, 235 (1931). Solomon v. Congregation Tiffereth Israel of Revere, 344 Mass. 755 (1962). United Kosher Butchers Association v. Associated Synagogues of Greater Boston, Inc., 349 Mass. 596, 598 (1965). Mitchell v. Albania Orthodox Diocese in America, Inc., 355 Mass. 279, 282 (1969).

tion of such housing. According to the Petitioners the issue is simply whether the land bought by the Archbishop with the parishioners' extra contributions was impressed with an enforceable parol trust or a resulting trust in favor of the parishioners for use as a cemetery." (Petition for Writ of Certiorari 79-195, p. 13.)

Certain facts significantly support the Respondents contention that the Parishioner's motive for instituting this suit is to frustrate the Archbishop's decision to utilize church land for church purposes which they oppose. First, a legally established cemetery owned and maintained by the Archbishop is located within the parish directly across the street from the locus. (Pet. for Writ 79-195, p. 3a, App.) Secondly, for 39 years, the Parishioners demonstrated no interest in the development of the locus as an additional cemetery. Even after the Archbishop's housing plans were made known, the Parishioners demonstrated no interest in the development of the locus as an additional cemetery. Even after the Archbishop's housing plans were made known, the Parishioners remained silent for six years and brought this civil suit only when this Court ended Scituate's appeals and issuance of the comprehensive permit which would allow construction became certain.[5]

It follows therefore that the crux of this litigation is whether the highest ecclesiastical official within the ecclesiastical jurisdiction may implement his decision involving church property to which he holds fee simple title against the will of certain laity. In its most

[5] The Parishioners filed a *Lis Pendens* in the Registry of Deeds at the time of filing their complaint. The continuing litigation has prevented a loan closing.

basic terms, who makes decisions within the Roman Catholic Church?

It is submitted that the ordering of decision making and administrative duties within a hierarchial church is the essence of internal polity. This Court has repeatedly held that the identification of internal lines of authority are matters exclusively within the competence of the appropriate ecclesiastical authority. The rationale of this Court's decision in *Serbian Orthodox* v. *Milivojevich, supra,* and its predecessors is grounded in two principal considerations involving the Free Exercise Clause of the Constitution.

First, there is the understanding that a hierarchial church is a *sui generis* institution. The internal lines of authority or responsibility may take whatever shape and contour ecclesiastical authorities deem necessary for that institution to operate under its understanding of itself.

This right of churches to organize themselves as they deem proper and to establish tribunals for deciding controversies within the church which was recognized by this court in *Watson* v. *Jones* (1871). supra at 728-729:

> All who united themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Secondly, the Supreme Court has recognized in *Serbian Orthodox, supra,* that there is a cognizable and negative impact upon Free Exercise rights by the im-

position of civil liability in a manner which conflicts with the internal lines of authority of a hierarchial church. The practical result of such action is to substitute the court's judgment of how the Church should be organized for that of the appropriate ecclesiastical authority.

It is the contention of the Respondents that the interpretation of lines of authority, supervision and decision making within the Church and its internal polity are matters wholly within the authority of ecclesiastical law and that the Free Exercise Clause of the First Amendment guarantees hierarchial churches freedom from government determination of their internal structure. *Serbian Orthodox, supra.*

The Massachusetts Supreme Judicial Court correctly recognized that acceptance of jurisdiction would require it to interpret ecclesiastical law pertaining to the allocation of power, rights, and responsibilities within the Roman Catholic Church, and to investigate the theological basis of the Archbishop's decision, all areas denied to the civil courts by the First Amendment to the United States Constitution.

The Roman Catholic Church has long recognized as a legitimate activity the performance of charitable acts for the service of man. The theological dimensions of such acts are twofold. First, such acts are an expression of the fulfillment of the mandate "to love one another" which is of fundamental import to the Christian belief. Secondly, the Church's active participation in such acts operates in a didactic fashion expressing by example the teaching of the Church with respect to social justice.

> "In fact, the Church is able, indeed it is obliged, if times and circumstances require it, to initiate action for the benefit of all men, especially those in need, like works of mercy and similar undertakings.
>
> The Church, moreover, acknowledges the good to be found in the social dynamism of today, particularly progress towards unity, healthy socialization, and civil and economic cooperation. The encouragement of unity is in harmony with the deepest nature of the Church's mission."

Pastoral Constitution on the Church in the Modern World, *Gaudium Et Spes,* 7 December, 1967.

It is a special responsibility of every Ordinary to make manifest the Church's teaching. This function relates not only to matters of doctrine and morals but also with respect to social justice.

> Bishops, to whom has been committed the task of directing the Church of God, along with their priests, are to preach the message of Christ in such a way that the light of the Gospel will shine on all activities of the faithful. Let all pastors of souls be mindful to build up their daily behavior and concern an image of the Church capable of impressing men with the power and truth of the Christian message. By their words and example and in union with religious and with the faithful, let them show that the Church with all its gifts is, by its presence alone, an inexhaustible font of all those resources of which the modern world stands in such dire need.

Decree on the Pastoral Office of Bishops in the Church, Vatican II, Christus Dominus, 28 October 1965.

The action of the Archbishop to commit certain portions of the Church's patrimony to the construction of

decent housing for those in need of it is clearly an action taken in the exercise of his ecclesiastic responsibilities in charity and in his teaching function.

> The Catholic community has a responsibility to act effectively to help meet the needs of those who lack adequate housing. We must confess that we have not done all we could. It is not enough for us to point to the reality of poor housing and recommend that government and other institutions take appropriate action. We must also reflect on our own responsibilities and opportunities for action. We call on individual Catholics, dioceses and parishes, as well as other Catholic organizations, to join us in a new commitment to those who suffer from poor housing.
>
> The Church alone cannot provide a significant quantitative answer to the cries for better housing. This is not its specific role, nor does it have the financial and technical resources to build all the required homes. However, it is our responsibility to proclaim the Gospel of Jesus Christ and its implications for our society. We must analyze in a competent and critical manner the aspects of housing which pertain to social justice. We must point constantly to human rights—and human suffering—involved in this issue. We must apply Christian social teaching to the resolution of the problem. We must seek to have a qualitative impact on the problem of housing deprivation in our society by attempting to change the systems and the policies that result in housing deprivation. There seem to be five possible approaches for Church involvement in housing: awareness, advocacy, providing services, stewardship and community-building.

The Right to a Decent Home, A Pastoral Response to the Crisis in Housing, A Statement of the Catholic Bishops of the United States, November 20, 1975.

Moreover, the recent decision of *Jones* v. *Wolf, supra,* (1979) is inapplicable in this instance. The Parishioners seek a civil judicial decree ordering conveyance of the property to them claiming that the Archbishop acquired title subject to either a valid parol trust or an enforceable resulting trust in their favor for use of the locus as a cemetery (Petition, supra, p. 5).

Under Massachusetts law, cemeteries may be established by municipalities or charitable (fraternal or religious) corporations. The municipality has declined to acquire the property and establish a cemetery (see fn. 3, supra).

Since the Petitioners are acting as parishioners, they presumably would establish any cemetery as a parish cemetery. Mass.St. 1897 c. 506 provides that Catholic cemeteries may be established, owned and maintained only by the Archbishop. In addition, ecclesiastical law requires that Catholic cemeteries be consecrated land, a sacramental act which can be performed only by or with the consent of the Archbishop. For a civil court to order the Archbishop to consecrate a cemetery against his will would be a gross violation of the Free Exercise Clause of the First Amendment.

Mass. Gen. Laws Ann. c. 114, s.34, supra, provides that no cemetery, municipal or private, may be established without the written approval of the local Board of Health after notice and public hearing. There is no certainty, and in view of the report of the town's interimmit committee (see fn. 3, supra), there is little likelihood that the Board of Health would grant approval for an additional parish cemetery. Since establishment of an additional parish cemetery by the Parishioners is an impossibility under both church and civil

law, there is no way which the parishioners trust argument can be sustained.

The Massachusetts Supreme Judicial Court decision is wholly consistent with its earlier decisions and merely reaffirmed the law in Massachusetts. "It is settled by our decisions that courts will not interfere in a controversy which is exclusively or primarily of an ecclesiastical nature." *United Butchers Association* v. *Associated Synagogues of Greater Boston, Inc., and Others,* supra at 598.

The rationale behind this policy was enunciated in *Moustakis, et al* v. *Hellenic Orthodox Society,* supra, at 466.

> "Courts do not inquire into questions exclusively ecclesiastical for the reason that religious freedom is the constitutional right of all citizens under our government; and for the further reason that, if the courts should deal with litigation of that nature, the whole subject of doctrinal theology, the customs, canonical laws both written and unwritten, and the fundamental organization of the various religious denominations would need to be examined with care for the purpose of reaching authoritative conclusions. Such a course by the courts would in the end deprive the denominations themselves of interpretations of their own body of church polity, and would establish the courts as the final arbiter in every religious controversy. The evils attendant upon such a practice have been thought far to outweigh the incidental advantage that might flow from its adoption."

Thus, the Massachusetts courts have adopted the same principles which this Court has established in its cases from *Watson* to *Milivojevich* v. *Serbian Orthodox,* supra.

This Court's decision in *Jones* v. *Wolf,* —— U.S. —— (1979) also recognizes that judicial resolution of the locus of decision making in a hierarchical church is not "neutral". Churches exist in time and space. The spiritual work which they carry on, both in worship and in the works of service, takes tangible and physical manifestations in property: hospitals, orphanages and housing, as well as churches and rectories.

The consequence of considering property as distinguishable from the church is to view the church as somehow existing apart and separately from its physical, tangible elements. To suggest that this church property can be treated by "neutral principles" which have no relevance to the First Amendment is to suggest that the organic nature of the institution can be ignored,

> . . . If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal body. Jones v. Wolf, slip opin.—p.9, citing, *Serbian Orthodox Diocese,* supra at 709.

Thus, the decision of the Massachusetts Supreme Judicial Court is in complete accord with the decisions of this Court.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for certiorari or in the alternative summarily affirm the decision of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

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September 17, 1979